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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD GEORGE ALLEN, Defendant and Appellant.	G052094 (Super. Ct. No. 11WF2145) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed.

Rodger P. Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Arlene A. Sevidal and Christen Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant was found guilty of two counts of committing a lewd act upon a child under age 14 (Pen. Code, § 288, subd. (a), counts 1 & 6)[1], two counts of oral copulation on a child age 10 or younger (§ 288.7, subd. (b), counts 2 & 3), one count of attempted lewd act on a child under age 14 (§ 288, subd. (a), count 4), one count of possession of child pornography (§ 311.11, subd. (a), count 5), and one count of distributing obscene matter (§ 311.10, subd. (a), count 8).[2] The court imposed an aggregate prison term of 30 years to life consecutive to a determinate term of 12 years. The punishment broke down as follows. Counts 2 and 3 — 15 years to life each, run consecutively; count 1 — the upper term of eight years, consecutive to count 2; count 4 — one year (one-third the midterm), run consecutive to count 1; count 5 — the midterm of two years, consecutive to count 1 but stayed pursuant to section 654; count 6 — two years (one-third the midterm), consecutive to count 1; count 8 — one year (one-third the midterm), consecutive to count 1.

Defendant raises four issues on appeal. First, he contends his conviction on counts 2 and 3 must be reversed because they violate the prohibition against ex post facto laws. We reject this argument because the jury was instructed on the proper time frame and the evidence supports a conclusion that defendant committed the crimes during that time frame. Second, he contends the court should have excluded confessions he made without being read his *Miranda* rights.[3] We conclude defendant was not in custody at the time, and thus a reading of *Miranda* rights was not required. Third, he contends an out-of-court interview with the victim was improperly admitted in violation of Evidence Code section 1360. We find no abuse of discretion in admitting the evidence. Finally,

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[1] All statutory references are to the Penal Code unless otherwise stated.

[2] Count 7 charged a lewd act, but the jury found defendant not guilty.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

defendant contends the pattern jury instruction concerning lewd acts is argumentative. We disagree. Accordingly, we affirm.

FACTS

The victim in this case is defendant's grandson, who we refer to as minor, and who was placed in defendant's primary care when he was about three months old. Minor was born in 2003. Minor's stepmother (mother) moved into defendant's house in 2006 or 2007. She stated that minor had his own bedroom, but he would always sleep in defendant's bed in the master bedroom.

On March 15, 2011, at about 6:00 a.m., Special Agent Cynthia Kayle of the Federal Bureau of Investigation (FBI), executed a search warrant at defendant's home in Cypress, California. Defendant, minor's parents, minor, and minor's stepsister were home. While other agents searched defendant's house for evidence of child pornography, Agent Kayle and Investigator Paul Carvo spoke with defendant.[4] Defendant told Agent Kayle he knew why the agents were at his house. Defendant told the agents he had two computers and an external hard drive in the house. He also provided his computer password to Agent Kayle. Defendant told the agent he was part of a peer-to-peer file sharing program called "Gigatribe," which is a program allowing people to share computer files over the internet. Defendant said there were 20 people in his network on Gigatribe, but he used to have about 300 people in his network. Defendant admitted he used Gigatribe to share child pornography, and he said his Gigatribe password was "pedoperv." He admitted he used the internet to seek out and masturbate to pictures and videos of naked children, which sexually excited him.

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[4] We provide additional details concerning the circumstances of the search in the discussion section below.

Agent Kayle asked defendant if he ever took photos of minor, and defendant replied that he took one "innocent" photo of minor. He claimed he did not share any photos of minor on Gigatribe. Defendant denied he ever inappropriately touched minor or any other child. However, Agent Kayle found photos of minor on defendant's computer. The photos included (1) an image of defendant and minor from the chest up, both unclothed, (2) an image of minor sleeping and only half covered by a sleeping bag, (3) an image focused on minor's genitals with his underwear pulled down, and (4) an image of minor's torso and genitals with his underwear pulled down.

There were also thousands of other images on defendant's computer in his Gigatribe file. Twenty to 30 of the photos depicted grown men having sex with infant children. Defendant had videos on his computer of persons having sex with young boys and an instructional manual on how to molest children. All of these files had been previously "clicked" and viewed on the computer — they were not "popups." There was also evidence of conversations between defendant and other people through his Gigatribe account. For example, defendant sent one message with an attached photo and said, "Here's one of me and my grandson. He will be seven years old [soon]. This was taken about two months ago. I was biting my tongue because [minor] was sitting on my lap while I was trying to hide my hard dick." Defendant exchanged many other messages about minor with people on Gigatribe.

In September 2011, at Cypress Police Officer James Kyle's request, minor's mother (defendant's daughter-in-law) went to the police station and placed a recorded phone call to defendant. The People played the phone call for the jury. On the phone with mother, defendant admitted he took naked pictures of minor. Defendant said he told minor not to tell anyone about the pictures, and minor replied "okay." Mother told defendant that minor said defendant touched him inappropriately, and defendant responded, "Get him therapy and get him the help that he needs, tell him the truth. If it

means me going to prison, it means me going to prison . . . , to help my grandson. Please help my grandson."

Defendant told mother that minor once touched defendant's penis while they were in bed, but he told minor to stop. Defendant also stated that "when [minor] was two years old he and I were here by ourselves, I sucked his dick. That is the gospel honest truth." He claimed he only did that once. When mother testified at trial regarding the pretextual phone call, defendant mouthed "I am sorry" to mother.

On September 7, 2011, Officer Kyle watched a Child Abuse Services Team interview of minor. Portions of the interview were played for the jury. Minor told the interviewer that he once saw a picture of a naked man on defendant's computer screen. Minor said that there were inappropriate pictures with "private parts" on defendant's computer, and defendant told minor not to tell anyone about the pictures. Minor also said that once when he was five years old, his underwear fell down as he was reaching to grab some medicine on a dresser, and defendant then took a photo of minor's "private parts" with his camera. On a different occasion, when minor was six years old, defendant took a photo of minor's private parts after minor used the restroom and had not yet pulled up his pants. Minor said that defendant told him not to tell people about the photos because "he thought that he would get in trouble and get arrested."

On September 12, 2011, Officer Kyle interviewed minor in the living room at minor's home. Minor was seven years old at the time. The interview was recorded and played for the jury. Minor told Officer Kyle that his underwear fell down once as he reached for some medicine on defendant's dresser, and defendant took a picture of minor naked. On a different occasion, after minor used the restroom in defendant's room, defendant touched minor's penis with his hand. Defendant was looking at pictures on his camera prior to touching minor's penis. Defendant told minor not to tell anyone that he touched minor's penis. Officer Kyle presented minor with a picture that showed minor's penis and a man's hand pulling down minor's underwear. Minor said that he believed the

hand in the picture was defendant's hand. Minor remembered that defendant "kissed" his penis on two occasions. One time, defendant kissed minor's penis in defendant's bedroom when minor was five years old. On a different occasion, when minor was three years old, defendant kissed minor's penis in minor's bedroom. Minor remembered that he was three years old because three was his favorite number. Defendant told minor not to tell anyone that he kissed minor's penis.

Minor was eleven years old when he testified at trial. When minor was younger, he lived with defendant. Minor and defendant had separate bedrooms, but minor sometimes slept with defendant in defendant's room. Minor testified that defendant took pictures of minor naked while he showed minor pictures of defendant's friends. Minor said defendant touched him on his penis on more than one occasion. One time, defendant kissed minor's penis with his lips. When he testified, minor could not remember how old he was when defendant kissed his penis.

Defendant testified in his own defense. He said that he chatted with strangers on Gigatribe about fantasies. Defendant explained that he was "caught up in some very dangerous pornography addiction." Defendant stated that he chatted about minor because strangers asked about minor. He claimed that the stories he told about minor were fictitious. He admitted that he shared photos of minor on Gigatribe "because I was being stupid." He also claimed that he only told mother that he "sucked [minor's] dick" when minor was two years old "because [mother's] in the habit of getting her own way." He claimed he believed mother would not stop questioning him until he admitted something to her. Defendant denied ever inappropriately touching minor. However, he admitted to pulling down minor's underwear and taking a picture of his penis.

DISCUSSION

No Ex Post Facto Violation

Defendant first argues his conviction on counts 2 and 3 for oral copulation on a minor 10 years old or younger violates the prohibition against ex post facto laws because it was based on events that occurred prior to the enactment of section 288.7. Defendant acknowledges that counts 2 and 3 expressly allege the acts occurred between minor's third birthday and September 12, 2011. Minor's third birthday was *after* the enactment of section 288.7. Thus, the information alleged that the acts charged in counts 2 and 3 all occurred after the enactment of section 288.7. Defendant counters: "But the evidence was not clear as to when in that range of time the acts occurred, and the jury was not asked to specify a date upon which it found the act occurred in order to reach a verdict of guilty. It is entirely possible that the acts, if they occurred, occurred prior to [minor's third birthday], and prior to the date when section 288.7 became effective on September 20, 2006."

"Our state and federal Constitutions prohibit ex post facto laws. [Citations.] Any law that applies to events occurring before its enactment and which disadvantages the offender either by altering the definition of criminal conduct or increasing the punishment for the crime is prohibited as ex post facto. [Citation.] Section 288.7 was enacted in 2006 and became effective on September 20 of that year. [Citation.] The statute created a new offense which imposes an indeterminate life sentence for sexual intercourse, sodomy, oral copulation, or sexual penetration of a child who is 10 years of age or younger. [Citations.] Therefore, any application of section 288.7 to conduct that occurred prior to September 20, 2006, is a violation of the state and federal ex post facto clauses." (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1306.)

Here, there was no ex post facto conviction. The information alleged the acts of oral copulation occurred "between [minor's third birthday] and September 12,

2011" — a period of time entirely after the effective date of section 288.7, subdivision (b). And the jury was specifically instructed it had to unanimously find defendant committed the acts of oral copulation "between [minor's third birthday] and September 12, 2011." Also, in closing argument, the prosecutor specifically explained to the jury the importance of the dates. Referring to count 1, the prosecutor explained the charge of lewd act was based on "oral copulation when [minor] was two. It's charged as a 288[, subdivision (a)] because 288.7[, subdivision (b)] didn't come into existence until 2006. You can't charge a crime until it's on the books. It was not on the books when [minor] was two years old." Moving on to count 2, the prosecutor stated, "Count two is the 288.7[, subdivision (b)], that is the oral copulation on a child ten years or younger. The allegation is between [the date] when [minor] was three to September 12th. [Minor] was between three and seven during count two when the oral copulation occurred in the defendant's bedroom."

The evidence at trial supports the convictions for counts 2 and 3 within the charged timeframe, as minor reported to Officer Kyle that defendant orally copulated minor once when he was five years old, and another time when he was three years old, which he remembered because three was his favorite number. True, when minor testified at trial four years later, he recalled only one incident and could not remember when it occurred, but the jury was entitled to credit the earlier interview. Given the clear instruction to the jury and the substantial evidence to support the verdict, we find no ex post facto violation.

In contending otherwise, defendant relies on *People v. Hiscox* (2006) 136 Cal.App.4th 253 (*Hiscox*) and *People v. Riskin* (2006) 143 Cal.App.4th 234 (*Riskin*), both of which we find distinguishable.

In *Hiscox* the defendant was convicted on 11 counts of lewd and lascivious conduct with a child (§ 288). (*Hiscox, supra,* 136 Cal.App.4th at p. 256.) The evidence at trial did not establish precisely when the acts occurred, and the information alleged

they occurred sometime between 1992 and 1996. (*Id*. at pp. 257-258.) The court imposed a sentencing enhancement based on section 667.61, which was enacted in November 1994. (*Hiscox*, at pp. 256-257.) "The court did not instruct the jury that its findings under section 667.61 were restricted to offenses committed on or after November 30, 1994, and defense counsel raised no ex post facto objection." (*Id.* at p. 258.) The court held the sentencing enhancement was an ex post facto violation. (*Id.* at p. 259.) *Hiscox* is easily distinguishable: here the jury was properly instructed and the evidence established that the violations occurred after the enactment of section 288.7, subdivision (b).

Riskin is in all relevant respects identical to *Hiscox*. The defendant was found guilty of multiple violations of section 288, and the court imposed the same sentencing enhancement under section 667.61. (*Riskin, supra,* 143 Cal.App.4th at p. 237.) The information charged the defendant with violating section 288 between June 15, 1994 and June 14, 1998. (*Riskin*, at p. 244.) The testimony at trial did not make it clear when the acts occurred. (*Ibid.*) And the jury was not instructed that it had to find the enhancement applied to acts after November 30, 1994, when section 667.61 became law. Given the uncertainty of when the crime occurred, the court held the sentencing enhancement was an ex post facto violation. (*Riskin*, at p. 245.) *Riskin* is distinguishable for the same reasons as *Hiscox*.

No Miranda *Violation*

Defendant's second assignment of error is a *Miranda* violation. He contends the admission of statements he made to Agent Kayle while FBI agents were searching his house should have been excluded under *Miranda*. We conclude defendant was not in custody when he made the challenged statements, and thus there was no *Miranda* violation.

Agent Kayle testified concerning the circumstances of her interview with defendant on the day the search warrant was executed, March 15, 2011. Upon arriving at defendant's house, defendant was placed in handcuffs for approximately five minutes while agents did a protective sweep of the house. He was not in handcuffs at any point while Agent Kayle was interviewing him. Approximately 11 or 12 employees of the FBI attended the search, though not all were agents. The interview took place in the kitchen of defendant's house and included Agent Kayle, her partner, and defendant. Prior to speaking with defendant, Agent Kayle informed defendant he was free to leave, and repeated that to him multiple times throughout the interview. Defendant's demeanor was calm and cooperative throughout the interview; Agent Kayle and her partner were likewise calm and "laid back." Neither Agent Kayle nor her partner raised their voice at defendant, and neither took an accusatory tone with him. About seven or eight minutes into the interview, it seemed defendant was uncomfortable speaking near his family members, so Agent Kayle's partner asked defendant if he would prefer to speak outside, which he did, and the interview was moved outside to the back patio. The total interview lasted approximately one hour. Defendant was not arrested on the day of the interview.

"*Miranda* requires that a criminal suspect be admonished of specified Fifth Amendment rights. But in order to invoke its protections, a suspect must be subjected to *custodial interrogation*, i.e., he must be 'taken into custody or otherwise deprived of his freedom in any significant way.'" (*People v. Morris* (1991) 53 Cal.3d 152, 197, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830 fn. 1.) "Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? [Citations.] The totality of the circumstances surrounding an incident must be considered as a whole. [Citations.] Although no one factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio

of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.' [Citation.] Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview." (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404, fn. omitted.) "We apply a deferential substantial evidence standard to the trial court's factual findings, but independently determine whether the interrogation was custodial." (*Id.* at p. 1403.)

Defendant cites no precedent finding circumstances akin to what occurred here to be a custodial interrogation. In our view, it was not. Agent Kayle told defendant multiple times he was free to leave, and the circumstances surrounding the interview corroborated Agent Kayle's assurances. Although defendant was initially handcuffed, it was brief, and the handcuffs were removed prior to the interview. The interview was conducted in a nonthreatening manor, in a nonthreatening location, and for a reasonable duration. Moreover, consistent with the foregoing circumstances, defendant was not actually arrested that day. Because it was not a custodial interrogation, no *Miranda* admonitions were required.

No Abuse of Discretion in Allowing Minor's Out-Of-Court Statements Into Evidence

Defendant next contends the court erred under Evidence Code section 1360 by admitting statements made by minor in the interview conducted by Officer Kyle. Evidence Code section 1360 provides, in relevant part: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another . . .

is not made inadmissible by the hearsay rule if all of the following apply:" "(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability." "We review a trial court's admission of evidence under section 1360 for abuse of discretion." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)

Defendant contends the court abused its discretion because Officer Kyle used a ruse with minor — he told minor that defendant had already confessed everything and wanted minor to tell the truth about everything. Defendant concludes, "The police manipulation in the questioning techniques which were used on this little boy compels the conclusion that the little boy's statements in response to the questioning were unreliable." Defendant cites no authority for that conclusion.

We disagree with defendant. Although the trial court was entitled to consider Officer Kyle's interview techniques in exercising its discretion regarding reliability, the ruse Officer Kyle used does not compel a conclusion, as a matter of law, that minor's interview testimony was unreliable. To the contrary, the court could properly conclude Officer Kyle's ruse was designed to elicit the truth by overcoming any misplaced loyalty minor may have felt toward defendant. This was especially important because, in a prior interview, minor revealed that defendant urged him not to tell anyone about the child pornography on defendant's computer, else defendant would be arrested. The court could properly conclude Officer Kyle's ruse was necessary to overcome defendant's attempt to suppress minor's testimony.

CALCRIM No. 1110 Is Not Impermissibly Argumentative

Defendant's final contention is that CALCRIM No. 1110, which defines lewd and lascivious conduct, and which was given to the jury, is argumentative. Defendant takes issue with the following statement from that instruction, which is an optional statement in the pattern instruction: "Actually arousing, appealing to, or

gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required." Defendant argues this rendered the instruction unconstitutionally one-sided in that, rather than defining the elements, it tells the jury what it need *not* find, which helps the prosecutor. Defendant does not challenge the correctness of the statement, cites no authority suggesting the instruction was improper, and defense counsel did not object to it at trial.[5]

We find no error in the instruction. The challenged statement clarifies the element of the crime that the touching must have been done "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child . . . ." (§ 288, subd. (a).) Defendant must have intended arousal, though it need not have been ultimately achieved. That is a fine distinction that could easily confuse a jury, particularly if there was no evidence that defendant was actually aroused.

And in any event, any error was plainly harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Defendant offers no explanation as to how this one line in an instruction made any difference at all. Defendant simply states, without elaboration, "Respondent cannot show the error to have been harmless beyond a reasonable doubt." But there is nothing in the record to suggest anyone paid any mind at all to the challenged statement. And it is not as though defense counsel was arguing there was no sexual intent because the evidence showed no actual arousal. Intent was not an issue at trial. The issue was whether the sexual touchings occurred at all. As defense counsel explained in closing argument, "with all these charges I'm going to be really focusing on the first element of each of these charges; it's whether or not it occurred. I'm not going to even bother talking about the age or state of

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[5] Defendant anticipated a forfeiture argument by contending trial counsel rendered ineffective assistance. We need not address that issue since we find no prejudicial error.

mind. Because if you believe that [defendant] oral copulated a young child . . . I don't think we have to go through the state of mind there."

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.